

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL TRUCKLOAD, INC. * Civil No. H-15-1651
*
VERSUS * Houston, Texas
* February 24, 2017
DALTON LOGISTICS, INC., * 10:30 a.m.
et al *

MOTION HEARING
BEFORE THE HONORABLE ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

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computer aided transcription.

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1 THE COURT: Cause number 15-CV-1651, Universal
2 Truckload, Inc. versus Dalton Logistics, Inc., et al.

3 Counsel, please announce your appearances for
4 the record.

5 MR. HAND: Your Honor, this is Ryan Hand for the
6 plaintiffs. I have Dan Fulkerson with me for Universal
7 Truckload.

8 THE COURT: Very well.

9 MS. KAPOOR: Your Honor, for defendant Hess
10 Corporation, Mini Kapoor from Hanes & Boone, and I have with
11 me Mr. Michael Mazzone, he's a partner on this case, and Mr.
12 Steven Messer, another associate on this case.

13 THE COURT: Very well.

14 MR. HAND: Your Honor, if you don't mind, we also
15 have the other parties present today if there is anything
16 related to the case that you would like to discuss. We know
17 we have our trial coming up. I just wanted to inform the
18 Court that all the parties are here maybe except for one;
19 just to offer that up, Your Honor.

20 THE COURT: Did you all want to make an appearance
21 or are you just going to observe?

22 MR. ROTHENBERG: Judge, I am Lawrence Rothenberg. I
23 am here for Dalton. And this is Jason Hanke. He is with our
24 office.

25 MS. MUNOZ: Your Honor, I am Laurie Munoz for the

1 Four Seasons defendants.

2 THE COURT: Very well.

3 MR. SWOFFORD: Your Honor, I am Tony Swofford for
4 Helmerich & Payne.

5 THE COURT: Very well.

6 On today's docket for consideration is the
7 motion for summary judgment, Document 88-1.

8 There is also a motion with a response. There
9 is also a motion to strike the reply and then a motion to
10 file said reply.

11 Then there is a motion for summary judgment,
12 Document No. 114-1, with response being Document No. 117-1,
13 which is also a motion for summary judgment against defendant
14 Hess and a response to Hess's motion for summary judgment.

15 There are several other pending motions which
16 are not ripe as of yet because some of the motions for
17 summary judgment were filed earlier this month and a response
18 has not yet been filed and we have not yet received a reply.

19 So, in regard to the defendant Four Season,
20 Inc.'s motion for summary judgment, Document No. 88, ready to
21 proceed? Is that going to be heard today?

22 MS. MUNOZ: Your Honor, I do not believe that was
23 going to be heard today.

24 THE COURT: Okay.

25 MS. MUNOZ: That is supposed to be heard sometime

1 next week.

2 MR. HAND: That's correct, Your Honor. We are in
3 the process of trying to schedule a hearing for that.

4 THE COURT: Very well.

5 MS. KAPOOR: I think the only motion set for motion
6 is Hess's motion for summary judgment.

7 THE COURT: Very well. Your motion?

8 MS. KAPOOR: Yes, sir.

9 MR. HAND: Yes, Your Honor. We have a counter
10 motion.

11 THE COURT: Right, which is part of the reply, a
12 response to it.

13 MR. HAND: Yes, Your Honor.

14 THE COURT: Very well.

15 MS. KAPOOR: May I proceed, Your Honor?

16 THE COURT: You may.

17 MS. KAPOOR: Do you mind if I use the podium?

18 Your Honor, I would first like to thank the
19 Court for allowing oral argument today.

20 Did you want me to use this?

21 THE COURT: Easier for the court reporter.

22 MS. KAPOOR: And I personally appreciate the
23 opportunity and experience to argue here today as an
24 associate.

25 In this case Universal has sued multiple

1 defendants, lumped them all together in one bucket. We
2 believe this does not work because every defendant in this
3 case is uniquely situated.

4 As to Hess, we don't know why we are in this
5 case. Universal has sued Hess for a breach of contract for
6 providing transportation services, but there is no contract
7 between Hess and Universal. There is no written contract,
8 there is no oral contract, there is no promise of any kind by
9 Hess to Universal.

10 Universal's corporate representative and
11 President, Universal's Director of Corporate Development,
12 Universal's CFO at the time all testified that there was no
13 interaction between Hess and Universal.

14 Now, plaintiff asserts that there are bills of
15 lading in this case which were produced for the first time
16 when Hess saw them when they were produced in this case; that
17 these bills of lading for transportation imposed contractual
18 obligations on Hess.

19 There were no bills of lading ever provided to
20 Hess during the transportation. Hess hired a rig mover,
21 Dalton, another defendant in this case, to move its rig
22 equipment as well as help with assembly and disassembly of
23 the rigs involved here.

24 Dalton fell short of the trucks it needed to
25 move those rigs, and Dalton contracted with Universal to

1 provide trucks. Hess was never provided any bills of lading
2 by Dalton; Hess was never provided any bills of lading by
3 Universal. Universal never provided any bills of lading to
4 Dalton. The only pieces of paper that are produced as bills
5 of lading imposing obligations on Hess in this case are
6 pieces of paper that Universal drivers filled in for
7 Universal's internal record keeping for their payroll
8 purposes so the drivers could get paid. These internal
9 documents suddenly are elevated to the level of contractual
10 obligations on a party like Hess that never ever received
11 these pieces of paper.

12 Plaintiff also states that the party that
13 Universal actually contracted with, Dalton, was Hess's agent.
14 But in response to our motion for summary judgment, Universal
15 offers no evidence to rebut our argument against any agency.
16 Universal offers no argument to rebut our argument.

17 There is no contract between Hess and
18 Universal, so there can't be any liability. There is no
19 agency application, agency principal application between Hess
20 and Universal because Universal never entered into a contract
21 with any of the Hess's agents.

22 Now, coming to my next point, Universal asserts
23 that Hess is liable under federal transportation law; and
24 that's a unique feature in this case with regard to Hess
25 because all the transportation that occurred in this case for

1 Hess was within the state of North Dakota, and the federal
2 transportation law that Universal is relying upon only
3 applies to interstate transportation.

4 All the moves that happened for Hess equipment
5 occurred between a point in North Dakota to another point in
6 North Dakota, never leaving the state. So all the
7 transportation was within North Dakota. The federal law that
8 applies only to interstate transportation is not applicable
9 here, and it's undisputed that all the transportation for
10 Hess occurred within North Dakota.

11 So no contract with Hess, no liability there;
12 no contract with an agent of Hess, no liability there, and
13 federal transportation law that Universal is relying upon
14 does not apply here.

15 And I meant to mention with regard to the bills
16 of lading, that's a unique feature as well with regard to
17 Hess. As compared to other defendants that may have created
18 the bills of lading, received the bills of lading or
19 otherwise had notice of the terms of the bills of lading,
20 Hess had none of those, so that's another unique feature.
21 Plaintiff cannot put all the defendants in one bucket here
22 because every single defendant is uniquely situated.

23 There is another point that's unique in this
24 case with respect to Hess. Unlike other defendants, there
25 are express written contracts regarding all the Hess's moves

1 that control payment liability.

2 There are two express contracts in place here.
3 Hess contracted with its rig mover, Dalton, whereby Dalton
4 provided services to Hess that were already move related.
5 Hess paid Dalton; Dalton provided service to Hess. Hess
6 fully paid Dalton. There is no dispute about that.

7 Dalton, as I said earlier, fell short on trucks
8 and it contracted with Universal, and under its contract with
9 Universal, Universal would provide trucks to Dalton and
10 Dalton would provide payment for those trucks.

11 Those were the contractual arrangements,
12 express detail contractual arrangements in place in this
13 case. Other defendants may or may not have these, but
14 definitely Hess, this is a unique feature about Hess.

15 So the contracts really expressly allocate
16 responsibility among these three parties as to who to pay
17 whom. Under these contracts Hess pays its rig mover. The
18 rig mover has, unbeknownst to Hess, has a contract with
19 Universal and the rig mover pays Universal.

20 So the recourse, if the rig mover doesn't pay
21 Universal, Universal's recourse is against the party it
22 contracted with, not against a third party like Hess which
23 never ever interacted with Universal. There is no documents
24 exchanged with regard to any consent on the part of Hess that
25 it was agreeing to be liable to Universal. There was never a

1 meeting of the minds.

2 So no contract with Hess, no liability there;
3 no liability under agency principles. Universal never
4 entered into any contract with an agent of Hess. Federal
5 transportation law does not apply because that applies only
6 to interstate transportation, and all transportation for Hess
7 in this case were intrastate, undisputed.

8 And then there is a fourth issue that I just
9 mentioned. There are express contracts where the three
10 parties have decided who will pay whom, express allocation of
11 payment responsibility. These are really clearly not liable.
12 My client is not liable.

13 Now, if the Court -- and I am really moving on
14 to really my last major point here -- if the Court is
15 inclined to allow Universal to assert its newly claimed, new
16 claims under North Dakota law, which happened for the very
17 first in Universal's response to our motion for summary
18 judgment, that law support Hess as well.

19 The closest case is E.W. Wylie, which is a
20 North Dakota Supreme Court case. And Universal admits that
21 under this case parties, as the parties here can allocate
22 liability. And indeed Universal cites to E.W. as the
23 controlling law, and we agree; but E.W. does not support
24 Universal's position. E.W. supports Hess's position.

25 And with the Court's permission, Your Honor, if

1 I may, I have a chart here which is really a blown-up version
2 from our briefing. If I may use the Elmo to project it out.

3 Please let me know, Your Honor, when you are
4 ready.

5 THE COURT: Go ahead. Thank you.

6 MS. KAPOOR: Thank you.

7 So looking at this chart, and just for the
8 court records, this chart was included in Docket No. 131 on
9 page 8. It's just really a blown-up version of that chart.

10 There are two parts here. There is this case
11 and there is E.W. Wylie. And just in looking, giving it a
12 cursory glance, the similarity between the contractual
13 arrangements in the two cases, they're almost mirrored.

14 In E.W. Wylie, Menard, a party just like Hess,
15 contracted with a middleman like Dalton for transportation of
16 lumber in that case. Under the agreement between the
17 defendant Menard and the middleman ITA in E.W. Wylie, Menard
18 was supposed pay ITA, the middleman. ITA was supposed to
19 provide services.

20 Now, ITA went to the middleman, entered into a
21 contract with a carrier, just like Universal here. It's
22 called Wylie in that case. And under that contract ITA was
23 supposed to pay Wylie and Wylie was supposed to perform
24 services under that contract. Menard, the defendant, was not
25 a party to the contract between ITA and Wylie, just like in

1 this case.

2 Hess is not a party to the contract between
3 Universal and Dalton. Universal is not a party in the
4 contract between Hess and Dalton.

5 So in Wylie, for various reasons ITA, the
6 middleman, did not pay Wylie, their carrier, just like here.
7 And Wylie sued the defendant Hess -- defendant Menard in that
8 case just like Universal sued Hess in this case.

9 The Court said, parties, you have, or carrier,
10 you have contractually agreed with the middleman, ITA, to
11 provide services and get paid by ITA. Your recourse is
12 against the middleman. You cannot ask the defendant, just
13 like Universal is asking here from Hess, you cannot ask the
14 defendant to pay for this, what was owed by ITA.

15 So the Court did not allow collection of the
16 amount owed by ITA. The Court saw there was no contract
17 between Wylie and Menard, just like there is no contract
18 between Universal and Hess, no liability.

19 So, what do we get from here? Both parties
20 agree that E. Wylie is the controlling case, but E. Wylie
21 supports, really mirrors the facts in this case; and there
22 the Court clearly said your recourse carrier is against your
23 middleman, the party you actually contracted with.

24 There is more, because the facts here are even
25 more favorable than E.W. There are two important facts. The

1 one I have already mentioned is there were no bills of lading
2 provided to Hess. In E.W. the defendant actually received
3 bills of lading, and even that was not sufficient. The Court
4 said, this is not sufficient to impose liability on the
5 defendant.

6 Here Hess never received bills of lading. And
7 the second fact that I think is even more favorable in this
8 case is, during the time the Hess rig moves were going on,
9 Hess was paying Dalton; but unbeknownst to Hess, Universal
10 and Dalton entered into negotiations whereby Universal was
11 going acquire Dalton, and Universal unilaterally, with no
12 notice to Hess, allowed Dalton to suspend payments. Hess has
13 no knowledge about this because Hess assumed they're coming
14 in.

15 So really now after all this, Universal is
16 seeking payment from Hess. Its recourse is against the party
17 contracted with. Its recourse is against the party that it
18 unilaterally allowed it to suspend payments. Its course is
19 not against Hess, who -- and the other thing is, Universal,
20 not only are there no bills of lading, Universal never, ever
21 sent a single invoice. There are like 55 invoices, about 55
22 invoices listed in the demand letter that Hess received.

23 Not a single invoice was sent to Hess. Hess is
24 not listed on the invoices. The invoices list Dalton and
25 Dalton only. Invoices were sent to Dalton and Dalton only.

1 The payment was demanded from Dalton and Dalton only until
2 Hess received the demand letter itself. That was right
3 before the lawsuit.

4 Universal, over an entire year while these
5 payments are piling up, becoming overdue, while they're
6 negotiating acquisition, nobody ever informs, Universal never
7 informed Hess saying that, hey, your rig mover is not paying
8 us, no information to Hess. And so, Universal's recourse is
9 against Dalton, if any, not against Hess.

10 So to conclude, Your Honor, no contract between
11 Hess and Universal, no liability there; no agency, no
12 liability under agency at all because Universal never entered
13 into any contract with an agent of Hess and has not responded
14 to our arguments in that respect.

15 No liability under federal transportation law
16 because everything was within the state of North Dakota and
17 federal transportation law does not apply there.

18 And finally, there are express contracts just
19 like in E.W. Wylie where parties have agreed to allocate
20 liability.

21 Hess's motion should be granted.

22 Thank you, Your Honor.

23 THE COURT: Thank you, counsel.

24 Counsel, response.

25 MR. HAND: Thank you, Your Honor. Would you like me

1 to use the podium or from here?

2 THE COURT: Wherever you are comfortable.

3 MR. HAND: Thank you, Your Honor.

4 First of all, I do appreciate the Court taking
5 time to hear this matter. I am honored to be here on behalf
6 of Universal Truckload. Universal is a motor carrier, a
7 trucking company located in Michigan. They do both
8 interstate, moves between states, and intrastate, strictly
9 within one state moves. They have USDOT motor carriage
10 authority and they are governed by the federal regulations in
11 the transportation code, Title 49 as well as for strictly
12 intrastate, in this case it's North Dakota, the North Dakota
13 rules, regulation and codes.

14 I think when you look at this case at first
15 blush -- and we have been dealing with this the whole time --
16 is that it comes down to, I think what they're saying through
17 their arguments is this isn't fair, Your Honor, we've already
18 paid. We paid the middleman, Dalton Logistics.

19 In a sense it comes down to what they want to
20 make is a fairness argument because they say that there was
21 no contract, although that is in dispute. This absolutely
22 was not a gratuitous move; there were multiple interactions
23 between Universal, the motor carrier, and Hess, the shipper
24 and receiver who would go and pick up their rig equipment,
25 receive it from Hess personnel, deliver for Hess. There was

1 Hess on both ends of the shipment where it was Point A and
2 Point B within North Dakota.

3 Going back to this fairness argument, Your
4 Honor, saying we already paid the middleman so we shouldn't
5 have to pay twice. There is a unique body of case law and
6 regulations regarding motor carriers to protect, Your Honor,
7 interstate commerce, the interest of interstate commerce and
8 motor carriers.

9 Motor carriage in interstate commerce and all
10 commerce, Your Honor, is so important to our economy, to our
11 country to keep the free flow of goods moving, Your Honor,
12 that there is a well-established body of case law that
13 says -- and I will get into that in a moment -- absent any
14 contract arrangement between the shipper, the receiver and
15 the motor carrier to somehow shift the obligation, the
16 ultimate obligation to get the carrier paid. Absent that,
17 the consignor, which in this case is Hess, the shipper, is
18 responsible to pay. So they're saying it's not fair to be
19 paid twice.

20 But there's also another unfairness.
21 Universal, the motor carrier, hasn't been paid. So as we
22 stand now, there is unfairness potentially to both parties.
23 And so we come to the Court under the body of law, the
24 federal law and North Dakota law, a well-established carriage
25 law, that provides that the motor carrier gets paid absent

1 some contract. And they do that so that interstate commerce,
2 intrastate commerce can freely move, that trucking companies
3 aren't burdened with the obligation to figure out the
4 creditworthiness of each party in the transaction. They move
5 freight; they get paid absent some express agreement.

6 THE COURT: When you say absent some contract, but
7 isn't it true that Universal did in fact have a contract with
8 Dalton?

9 MR. HAND: Yes, Your Honor. We had a contract with
10 Dalton, and it was very similar to the contract that you
11 could see in the Excel case, which is that, this is the
12 middleman. The contract says you look first to Dalton as the
13 middleman, as the broker.

14 And then there is nothing in the contracts, the
15 case law that we have cited, whether it be Wylie, Western
16 Home, Excel. They say that unless there is an agreement
17 between the shipper and the motor carrier there is no
18 agreement here about payment obligations.

19 The only contract there is is between Universal
20 and -- a written contract between Universal and Dalton that
21 says we'll come to you first because Universal -- I am
22 sorry -- Hess is actually new to Dalton as the middleman to
23 get this stuff shipped. They have a complicated
24 contractual -- not all that complicated actually, but they've
25 got a book almost of contracts, which this is the master

1 service agreement between Dalton and Hess. And in this
2 contract it allows for subcontracting of this to third
3 parties of the obligations under the contract.

4 On page 120 -- I'm sorry. I don't know if I
5 answered your question, Your Honor.

6 But you're right. There is no contract between
7 Universal and Hess other than the contract of the bill of
8 lading, the implied in law or implied in fact contract
9 because there was a relationship. And under North Dakota
10 law, which we agree governs, and our second amended complaint
11 recognizes that this is a contractual matter. We've pled
12 both contract and quasi contract because Universal showed up
13 and interacted with Hess on a regular basis to transport
14 multiple loads for the benefit of Hess so that Hess could go
15 to these various rig drilling sites.

16 THE COURT: I don't think there is any question that
17 Hess received a benefit. It had its goods moved. But the
18 question is, in regards to the liability for the move, I
19 believe that from even your response and from the motion for
20 summary judgment, Universal was contacted by Dalton for this
21 move, and it was instructed by Dalton where to go to pick up
22 the shipment at Hess, where to deliver the shipment that was
23 going to be picked up at Hess, and it turned out Point A to
24 Point B was Hess. Correct?

25 MR. HAND: Yes, Your Honor.

1 THE COURT: But all that direction came from Dalton,
2 the middleman?

3 MR. HAND: Right, on behalf of Hess.

4 THE COURT: And the invoices that Universal issued
5 were issued to Dalton?

6 MR. HAND: Initially, Your Honor.

7 THE COURT: Was there ever a time prior to, as
8 counsel pointed out, the demand or the filing of this
9 lawsuit, where a invoice was sent to Hess?

10 MR. HAND: After Dalton defaulted on its
11 obligations, because the contract says you look first to
12 Dalton, not exclusively, but first. When it became clear
13 that they were not going to pay, after repeated requests for
14 payment, because that's where we had to go first, then we
15 sent a demand, a detailed demand with every single freight
16 charge to Hess saying, listen, Dalton has defaulted and these
17 need to be paid. You were the shipper, you were the
18 receiver, the consignor, the consignee. You got the benefit,
19 so we are now asking that you pay.

20 And that scenario is exactly what was discussed
21 in Excel Transportation, it's precisely on point, where the
22 Southern District of Texas, applying essentially
23 well-litigated and an extreme long history of carrier law
24 that law says, and I quote from this opinion, "the Bedrock
25 rule of carriage cases is that absent malfeasance, the

1 carrier gets paid. It is superficially unfair that Excel and
2 Marriott" -- they were the shippers and the original freight
3 forwarder third party. They already made a payment. The
4 shipper, being Marriott, made a payment to -- there were two
5 brokers in the middle. But the motor carrier didn't get
6 paid.

7 So it says, the opinion says "it's
8 superficially unfair that Excel and Marriott must pay for the
9 shipments twice. However, allowing them the benefit of
10 carriage without compensation, the carrier would eventually
11 cripple the shipping industry and the economy generally as
12 carriers devoted their time to investigate potential
13 customers."

14 And it goes on to talk about just because you
15 look one place first, that doesn't prevent the carrier from
16 going to the consignor or the consignee once the middleman,
17 the broker, defaults, because that is the party that received
18 the benefit of the service, and that is the party, even under
19 North Dakota law there's a statute that we've cited in the
20 Century Code that says absent a express waiver, absent some
21 arrangement between the motor carrier and the
22 consignor/consignee that says that the burden of paying the
23 freight charges shifts, it stays with the consignor.

24 Hess is a sophisticated corporation. It had an
25 opportunity on multiple occasions to negotiate payment.

1 THE COURT: What benefit did Hess get from
2 contracting with Dalton then if in fact that it was going to
3 be liable for these charges if in fact Dalton didn't pay?
4 What benefit was it to Hess to contract with Dalton?

5 MR. HAND: That they wouldn't have to, Your Honor,
6 go out and find the motor carrier. It's like a broker in the
7 middle. The benefit is is that we don't know where these
8 trucks are. We need trucks to get our freight moved quickly
9 and timely around North Dakota so we can drill for oil and
10 gas.

11 The benefit they got was they shipped it to a
12 third party to make those arrangements. It's very common in
13 the shipping industry you got a broker in the middle, the
14 customer, the shipper --

15 THE COURT: Well, I get that portion. But what
16 contractual benefit did it get? Did it get any insulation
17 from a suit such as this by contracting with Dalton instead
18 of contracting directly with Universal?

19 MR. HAND: Yes. There is no insulation in the
20 contracts that says, that provides that the motor carrier
21 can't go back against Hess. The benefit they got was the
22 brokerage.

23 The contracts expressively state that under the
24 scenario, if you look to -- there's a mechanism under Section
25 4.5, page 100 of the MSA, the Master Service Contract between

1 Hess and Dalton that says the contractor, which is Dalton,
2 hereby authorizes the company to deduct or withhold from
3 payment due the contractor without liability for interest all
4 amounts for which company, Hess, may become liable to third
5 party by reason of the contractor's failure to pay its
6 suppliers of materials and labor.

7 So they had an express provision in the
8 contract that says, yes, you can use subcontractors. It's
9 mentioned throughout the Master Service Agreement. Dalton
10 usually used subcontractors. But if you don't pay them, we
11 have a way, a mechanism to make sure that those third party
12 contractors get paid and they're not stuck in the middle by
13 an unscrupulous party that brokers the freight.

14 And that's again a point that is made in the
15 Excel case where the Judge, the Court says that CSX -- that
16 was the carrier, a rail carrier -- neither released Excel
17 from liability nor misrepresented the payments. It's Excel's
18 responsibility to choose a subcontractor that can forward
19 monies as well as freight. It was the shipper who had the
20 obligation to make sure that the middleman was getting the
21 payments to the right people.

22 And in this case, Your Honor, they just turned
23 a blind eye. They knew that Universal was shipping this
24 freight. They showed up there on a regular basis, and there
25 was no payment for almost \$700,000 worth of shipments that

1 were being made. And that is the type of inequity that the
2 federal common law, North Dakota law says in order to protect
3 commerce, we say that the burden rests on the consignor or
4 consignee to shift the obligation away from this. You cannot
5 use a third party to get around that obligation unless you do
6 so with a agreement between the motor carrier and the
7 consignor or consignee.

8 THE COURT: Thank you, counsel.

9 Anything else?

10 MR. HAND: On the point that, Your Honor, they make
11 that the cause of action was not timely pled, this cause of
12 action is front and center in our second amended complaint.
13 We reference intrastate shipments, we reference contract law,
14 we reference federal law, but we also reference intrastate
15 shipments.

16 North Dakota bills of lading are attached to
17 the complaint. So these shipments in North Dakota were all
18 intrastate, is what's pled in the lawsuit. So it's not a new
19 cause of action. It's just a code section that establishes
20 where ultimate liability should rest in the absence of a
21 contract that says it ships somewhere else. So I just wanted
22 to make that point, Your Honor.

23 And if you don't mind, this diagram, can I
24 point out a couple of things on the diagram, Your Honor?

25 THE COURT: Yes, sir.

1 MR. HAND: On the diagram, it's not completely
2 accurate because, first of all, the Wylie case is interstate
3 federal law, number one. This is North Dakota law where you
4 have a statute says the consignor is presumed liable.

5 Number two, there is no middleman here. This
6 was Wylie, the motor carrier, had contracted with IKEA, or
7 IKA to haul freight to Menard. There was non middleman and
8 there is also freight terms. They were discussed in the case
9 said that says it's free on board, FOB. There is no freight
10 terms here. Hess was free, if they wanted to, to insist on
11 freight terms. There were no freight terms. They could have
12 said, when you pick these up, we need to have an agreement on
13 freight terms. There is no such agreement.

14 Difference here again, we have Hess has the
15 freight, contracted a third party to make sure that it gets
16 shipped. Then Dalton says, okay, Universal, you handle the
17 Hess freight.

18 This is way the diagram looks is because
19 there's a middleman. There is no middleman in Wylie. And
20 the North Dakota statute, the Century Code says that absent
21 that contract that says otherwise, the consignor, the shipper
22 has to pay. So there was constant interaction between
23 Universal and Hess that's being completely overlooked by Hess
24 in this case.

25 So there's a major difference between the way

1 the parties were aligned between Wylie and this case. The
2 law is slightly different because in Wylie there was no code,
3 that regulatory scheme that said that the consignor or
4 consignee had to pay. They went strictly on what the parties
5 contracted to; and the parties, including the FOB terms,
6 there are no FOB terms, shipping terms, any of that nature,
7 although those bills of lading -- and there's testimony --
8 were given to Hess and they're signed. There's, if nothing
9 else, a fact issue about those bills of lading; but North
10 Dakota law doesn't even require a bill of lading.

11 It's clear that Universal is transporting this
12 freight for the benefit of Hess with Hess's express
13 permission, you show up with a Universal truck. Their
14 manager, who testified, or corporate representative, said,
15 yeah, we saw Universal show up all the time. We knew
16 Universal was handling this freight.

17 Well, what did you do to protect Universal?
18 They did nothing. They could have under their own contracts,
19 but they didn't. And there is nothing in any of these
20 contracts that say that the motor carrier waives it right to
21 an express contract that says we can't go back after the
22 party who set this whole thing up.

23 THE COURT: Very well.

24 MR. HAND: Thank you, Your Honor.

25 THE COURT: Very brief response.

1 MS. KAPOOR: Yes, Your Honor. Thank you.

2 Your Honor, first let me address Excel.

3 Universal has cited extensively to Excel, relies a lot on
4 Excel but really looks at the conclusion of Excel but does
5 not look at how the Court arrived at that conclusion.

6 There the party is a party like Hess, had a
7 history of interaction, invoices sent to a party like Hess by
8 the carrier. And the party like Hess had notice of the terms
9 of transportation. That's not the case here.

10 Universal cites to the Bedrock Rule applied by
11 Judge Hughes in that opinion. Judge Hughes' opinion is based
12 on the interstate law applicable to that case; and even if
13 this were an interstate case, the facts are completely
14 different.

15 Mr. Hand says there was constant interaction
16 between Hess, the drivers are coming into the site and
17 dropping. If you look at the testimony, the summary judgment
18 evidence, our corporate representative said, yeah, we
19 occasionally saw Universal trucks. That does not rise to the
20 level of a contract with Hess. Universal's contract was with
21 Dalton and Dalton alone.

22 And the FOB terms issue, the issue here is
23 Dalton leased trucks from Universal because it was short on
24 trucks. It was not a per shipment basis. Bills of lading
25 are not the issue here because it's the shipment, not the

1 shipment, but the trucks itself that are being leased, and
2 they're being used for any and every kind of shipment. There
3 is no per shipment transportation agreement.

4 And then finally I want to say that Mr. Hand
5 has twisted our argument into a fairness argument. We never
6 made any fairness argument in any of our briefing. We have
7 made an argument based on the legal law that's applicable in
8 this case.

9 And finally, the North Dakota Century Code that
10 Mr. Hand talked about and is in their briefing, it provides,
11 it was codified in 1877, provides a mechanism for allocating
12 liability between a consignor and consignee. It does not
13 address a situation where there's a third party like Dalton
14 in this case. So we do not even believe that code has
15 anything to do with this case.

16 And then as far as Wylie is concerned, the
17 contractual arrangement mirrors this case. The Court said
18 contract law ordinarily determines who is liable for payment
19 for freight charges under common law. The Court then looks
20 at the contractual arrangements and say, carrier, your
21 recourse is only against the defendant, not against -- I'm
22 sorry -- against the middleman, not against the defendant.
23 It's very clear.

24 And Universal cites to no authority where North
25 Dakota or any other case has found a party like Hess liable

1 that never received any terms of the alleged contract, the
2 bills of lading; and Universal doesn't cite to any authority
3 where a party like Hess, who's already paid, is liable to a
4 third party, which this party never had interaction with.

5 So we believe Hess's motion should be granted.

6 THE COURT: Thank you, counsel.

7 Last word.

8 MR. HAND: Thank you, Your Honor.

9 It's clear what Hess is doing here is using a
10 middleman to try to get around a payment of certain third
11 parties. And the contract between Dalton and Hess provides a
12 mechanism so that the third parties, innocent third parties
13 like Universal gets paid.

14 They ignore a body of case law that says the
15 bedrock principle is a carrier gets paid absent malfeasance
16 and absent a contract between the two, the motor carrier and
17 the consignor/consignee that shifts the obligation to pay.
18 There is no contract here that Hess entered into with
19 Universal that says, Universal, you waive the right to go
20 after us.

21 They have could have as a sophisticated company
22 required bills of lading to say, guess what? Once we pay
23 Dalton, we're done. We delivered bills of lading per
24 Dalton's corporate representative. We delivered bills of
25 lading signed that contain none of that, the Section 7

1 non-recourse language to absolve Hess from paying it. So
2 they are required to pay.

3 The whole part of a privity and contract -- and
4 this is an independent contractor -- that's also discussed in
5 Excel. In Excel the Court said, since Excel was neither
6 Cav's principal nor in privy with CXS, it feels it is
7 absolved of responsibility. But Cav's status -- this is the
8 middleman -- as an independent contractor does not release
9 Excel from liability.

10 And then he goes the very next paragraph
11 talking about the Bedrock Rule that the carrier gets paid in
12 order so that interstate commerce can continue to move and
13 shippers, consignors, consignees that utilize motor carriers
14 have to make sure that a carrier gets paid so that commerce
15 continues.

16 In an area like Houston where we have multiple
17 transactions, a shipper cannot put middlemen in the middle
18 and absolve itself of any responsibility to get the actual
19 carrier, the one who does the work, paid. Carriers would
20 shut down if companies like Hess were allowed to just find
21 some middleman and shift everything off on the middleman, and
22 then the middleman folds and then they can say, nope, we're
23 not responsible.

24 The law is designed to protect motor carriers,
25 to protect interstate commerce and keep the free flow of

1 goods going, and that's a long-standing principle as
2 referenced in Excel, which is embodied in the state law in
3 North Dakota that says the consignor is presumed to be liable
4 absent some contract, which there is none here that they
5 could have entered into and said we want you to waive your
6 rights against us.

7 Thank you, Your Honor.

8 THE COURT: Counselor, the other point is that there
9 was a motion to strike I think your reply. Is that correct?

10 MR. HAND: Not that I'm aware of.

11 THE COURT: Was that the other motion? Okay.

12 Very well. Thank you. The Court will take it
13 under advisement.

14 The Court would like to note that this oral
15 hearing was taking place pursuant to the Court's Rule A5
16 which allowed a lawyer who has been in practice, younger,
17 less than seven years, because she was primarily going to be
18 making the argument. So, well done.

19 MS. KAPOOR: Thank you, Your Honor.

20 THE COURT: And, counselor, thank you for
21 recognizing the rule and putting forth your young lawyers.
22 It's very important to our profession to have young lawyers
23 to come to court to make arguments to participate such that
24 this art form that we have, being a trial advocate, will go
25 forward. And so, the Court is very appreciative of you

1 taking advantage of that rule.

2 MR. MAZZONE: And, Your Honor, we appreciate you
3 having the rule.

4 THE COURT: Very well.

5 Counsel, we are adjourned. You are excused.
6 Have a good weekend.

7 MR. MAZZONE: Judge, before you go, could we talk
8 about scheduling for a minute? We are set for trial March
9 27th. And I am sure you have heard this oftentimes from
10 lawyers. We want to save our clients a little bit of money
11 not having to prepare for a trial that may not be necessary.

12 THE COURT: Well, I understand there are a lot of
13 shoes, a lot of dominos and that there are several motions;
14 and so, I will endeavor, with the other things on my desk, to
15 get you a timely ruling.

16 In addition, I know that there are other
17 motions that are similar to this that need to be heard as
18 well in the next few weeks; and so, I am going to try to make
19 sure that that's done.

20 As I was noting when I first came out, I note
21 that there was a motion for summary judgment filed on
22 February the 6th. So we haven't even received a response to
23 that yet, and then obviously the reply. So some are just not
24 ripe yet, and so we have some more potential hearings or
25 deadlines to meet.

1 The Court appreciates you bringing that to its
2 attention, and I will keep that in mind.

3 MR. MAZZONE: Thank you, Judge.

4 MR. ROTHENBERG: Your Honor, just one question. Do
5 you want all of these motions heard orally or are you fine
6 submitting them?

7 THE COURT: I typically do these off the paper. And
8 again, the Court has a rule, A5, which states that if there
9 is a lawyer in practice less than seven years and they wish
10 to argue the motion, the Court will make time for that. And
11 so, counsel filed the request and the Court granted it.

12 And so typically I'll do these off the paper.
13 There may be a situation where I get into the paper and I
14 determine oral argument would be helpful, and then I will
15 call you in on that. But that's kind of the default, is
16 doing it off the paper and then reverting to a oral argument
17 if necessary.

18 MR. ROTHENBERG: Yes, sir. Thank you, Judge.

19 MS. KAPOOR: Thank you, Your Honor.

20 THE COURT: Anything else?

21 All right. Enjoy your weekend. Again,
22 counsel, well done.

23 MS. KAPOOR: I appreciate it, Your Honor.

24

25 (Conclusion of proceedings)

1 CERTIFICATION

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5 I, Fred Warner, Official Court Reporter for the
6 United States District Court for the Southern District of
7 Texas, Houston Division, do hereby certify that the foregoing
8 pages 1 through 32 are a true and correct transcript of the
9 proceedings had in the above-styled and numbered cause before
10 the Honorable ALFRED H. BENNETT, United States District
11 Judge, on the 24th day of February, 2017.

12 WITNESS MY OFFICIAL HAND at my office in Houston,
13 Harris County, Texas on this the 9th day of May, A.D., 2018.
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17

18 /s/ Fred Warner
19 Fred Warner, CSR
20 Official Court Reporter
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